

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SAMISONI TAUKITOKU,

Petitioner,

v.

FILSON, et al.,

Respondents.

Case No. 3:16-cv-00762-HDM-CSD

ORDER

This habeas matter is before the Court on Petitioner Samisoni Taukitoku's Motion for Discovery ("Motion") (ECF No. 51). Also before the Court is Petitioner's Motion to Extend (ECF No. 58).

I. Background¹

Taukitoku challenges a 2009 state court judgment of conviction for three counts of first-degree murder with use of a deadly weapon and four counts of assault with use of a deadly weapon. Taukitoku was sentenced to three consecutive sentences of life imprisonment without the possibility of parole and four terms of 28 to 72 months for the assault charges, running concurrent with one another but consecutive to the life sentences.

On October 28, 2007, a shooting occurred at a Halloween party in Reno, Nevada with 120-170 people, mostly university students, in attendance. Three people were killed. Several fights broke out during the party. Taukitoku brandished a firearm and threatened an

¹The Court's summary is drawn from the pleadings and the Court's independent preliminary review of the record. The summary is intended only for the purpose of deciding the instant motion for discovery and is not adopted for any other purpose in this habeas proceeding, including but not limited to adjudication of the merits of the petition.

1 individual in the kitchen inside of the house. After the incident
2 in the kitchen, there was another fight outside of the house
3 involving Petitioner's co-defendant, Saili Manu. He was seen also
4 brandishing a firearm. He pled guilty to two counts of assault
5 with a deadly weapon. Manu was not called to testify at Taukitoku's
6 trial, and no evidence was presented at trial that Manu had fired
7 any shots.

8 Taukitoki fired several shots outside of the house. He
9 testified that he was assaulted by several people when he was
10 leaving the party. After being hit with an object and falling to
11 the ground, he pulled his gun and started to shoot blindly. At
12 trial, eyewitness testimony was presented that Taukitoku shot one
13 or two people, including victim Charles Coogan Kelly. Three
14 witnesses testified that Taukitoki was the only offensive shooter.
15 Taukitoku and Manu were arrested while driving away from the party.

16 Another student attending the party, Andre Lawson, testified
17 that he saw Taukitoku with a gun, walked away from the area, and
18 heard gunshots shortly after. Lawson testified that after hearing
19 gunshots, he then ran to his car, got his gun, and fired two shots
20 in the air to disburse the crowd.

21 The State's ballistics expert, Kevin Lattyak, compared the
22 projectiles, casings and fragments recovered from the scene to
23 Taukitoku's, Manu's, and Lawson's firearms. Lattyak testified that
24 with the exception of two or three projectiles or fragments, the
25 remaining ballistics evidence either positively matched
26 Taukitoku's gun or was consistent with his gun. Lattyak further
27 testified that none of the bullets recovered could have come from
28 a .32, which is the weapon Manu had, because they were too big.

1 Two bullets recovered from the body of Charles Coogan Kelly were
2 positively matched to Taukitoku's gun. A projectile recovered from
3 Derek Jensen's body bag was positively matched to Taukitoku's gun.
4 No bullets were recovered from the body or body bag of the third
5 victim, Nathan Viljoen.

6 The Court granted Taukitoku's first motion for discovery and
7 instructed the Washoe County District Attorney's Office to provide
8 all materials previously disclosed to defense before and during
9 Taukitoku's trial. (ECF No. 25.) After receiving the materials
10 provided as a result of the order granting discovery, counsel
11 conducted its own investigation for the instant habeas case.
12 Counsel located and obtained declarations from several
13 eyewitnesses who claim they saw persons other than Taukitoku fire
14 shots during the fights. (Exs. 5-10; ECF No. 33.) One individual
15 observed Lawson fire six to seven rounds toward the house from the
16 street. (Ex. 55; ECF No. 47-13.) Another individual saw a tall
17 person with a thin build wearing dark colored clothes shoot six to
18 eight rounds toward the house.² (Ex. 36; ECF No. 47-14.) Another
19 witness who refused to sign a declaration with counsel but whose
20 observation was at least partially reported to the police, also
21 saw a man wearing a shirt similar to what Lawson wore that night
22 shooting toward the house. (Exs. 26, 39; ECF Nos. 47-4, 47-17.)
23 One witness avers he saw someone fitting the description of Manu
24 shoot toward the garage during the fight and that he "knew [that
25 person] killed DJ because [he] saw DJ collapse near the garage
26 door." (Ex. 26; ECF No. 47-15.) Another witness also observed

27 ² Taukitoku is a large, Tongan male with dreadlocks and attended
28 the party wearing a white t-shirt. (See ECF No. 33-1.)

1 someone matching the description of Manu fire approximately four
2 shots. (Ex. 40; ECF No. 47-18.)

3 In the instant habeas case, Taukitoku filed a third motion
4 for discovery seeking the materials sought in the instant motion.
5 (ECF No. 32.) The Court denied his motion without prejudice finding
6 that Taukitoku should first pursue his unexhausted claims and their
7 related discovery in state court in the first instance. (ECF No.
8 41.) The Court then granted Taukitoku's motion for stay and
9 abeyance pending exhaustion of his unexhausted claims. (ECF No.
10 44.) The state court dismissed his state habeas petition finding
11 his claims procedurally barred.³ (Ex. 44; ECF No. 47-22.) Taukitoku
12 appealed and the Nevada Supreme Court affirmed. (Ex. 49; ECF No.
13 47-26.)

14 II. Discussion

15 "A habeas petitioner, unlike the usual civil litigant in
16 federal court, is not entitled to discovery as a matter of ordinary
17 course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a)
18 provides that "[a] judge may, for good cause, authorize a party to
19 conduct discovery under the Federal Rules of Civil Procedure . .
20 . ." In *Bracy*, the Supreme Court held that Rule 6 was meant to be
21 applied consistently with its prior opinion in *Harris v. Nelson*,
22 394 U.S. 286 (1969), which expressly called for the adoption of
23 the rule. 520 U.S. at 904 & 909. In *Harris*, the Supreme Court held
24 that "where specific allegations before the court show reason to
25 believe that the petitioner may, if the facts are fully developed,
26

27 ³ Taukitoku's requests for an evidentiary hearing in state court
28 were denied. (ECF No. 51 at 11.)

1 be able to demonstrate that he is . . . entitled to relief, it is
2 the duty of the court to provide the necessary facilities and
3 procedures for an adequate inquiry.” 394 U.S. at 300 (emphasis
4 added). This inquiry is informed by the essential elements of the
5 claims for which petitioner seeks discovery. *Bracy*, 520 U.S. at
6 904. Thus, the purpose of discovery in a habeas proceeding is not
7 to develop new claims, but, rather, to develop factual support for
8 specific allegations contained in existing claims. *See also Rich*
9 *v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (“Habeas is an
10 important safeguard whose goal is to correct real and obvious
11 wrongs. It was never meant to be a fishing expedition for habeas
12 petitioners to ‘explore their case in search of its existence.’”).
13 Moreover, additional factors may influence whether the court
14 grants leave to conduct discovery. *See, e.g., Sherman v. McDaniel*,
15 333 F. Supp. 2d 960, 969 (D. Nev. 2004) (noting that the court, in
16 exercising its discretion under Rule 6, should take into
17 consideration whether the claims to which petitioner’s proposed
18 discovery relates are exhausted in state court).

19 Taukitoku argues that the witness declarations call into
20 question Lattyak’s conclusion that “virtually all of the bullets
21 and shell casings, including those recovered from the victims’
22 bodies, matched or were very similar to those from [Taukitoku’s]
23 firearm.” (ECF No. 51 at 6-7.) Taukitoku argues that in light of
24 the evidence that two other people fired shots during the fight,⁴
25 the ballistics evidence must be subjected to adversarial testing.

26 ⁴ While, as noted, there was evidence at trial that Lawson had
27 fired shots, the evidence was that he had shot into the air; now
28 Taukitoku has uncovered several witnesses who observed Lawson, or
someone matching his description, fire shots at the house.

1 To that end, Taukitoku seeks release of Lattyak's bench notes and
2 photographs, on which he based his report, as well as the physical
3 evidence itself, for review by an independent expert. (ECF No. 51
4 at 3.)

5 Taukitoku asserts that the discovery sought is necessary to
6 develop Claims 1, 2, 6, and 8 of his second amended petition. (ECF
7 No. 51 at 8-9.) He further alleges that the evidence should have
8 been obtained through reasonable investigation by Taukitoku's
9 trial attorney and post-conviction counsel and he was prejudiced
10 by their failure to do so. (*Id.*) In Claim 1, Taukitoku alleges
11 that he was denied effective assistance of counsel based on trial
12 counsel's failure to investigate the case. (ECF No. 50.) In Claim
13 2, Taukitoku alleges that he was denied his right to due process
14 and a fair trial when the trial court erroneously denied the
15 defense a request for a continuance based on the late disclosure
16 of critical and voluminous discovery. (*Id.*) In Claim 6, Taukitoku
17 alleges that he was denied effective assistance of counsel when
18 his appellate counsel failed to raise on appeal the trial court's
19 error in denying a continuance. (*Id.*) In Claim 8, Taukitoku alleges
20 he was denied his right to due process, a fair trial, and equal
21 protection based on cumulative error. (*Id.*)

22 Taukitoku further asserts that he demonstrates good cause,
23 that the requested materials will be exculpatory, and the requested
24 materials are necessary to demonstrate prejudice. (ECF No. 51 at
25 8.) Taukitoku's trial counsel admitted that she did not retain a
26 ballistics expert. (*Id.* at 9.)

27 Respondents argue that Taukitoku fails to show good cause and
28 that his discovery requests are purely speculative. (ECF No. 55 at

1 4.) Respondents assert that the evidence at trial showed three
2 individuals had firearms and that Lawson testified that he
3 discharged his firearm. (*Id.* at 5.) All three firearms were tested,
4 and it was concluded that the bullets that killed the victims
5 matched that of Taukitoku's firearm. (*Id.*) Respondents argue that
6 Taukitoku fails to establish how further investigation would lead
7 to a different outcome. (*Id.*)

8 In addition, Respondents argue that Taukitoku is precluded
9 from relief because his claims are procedurally barred. (*Id.* at
10 6.) They also assert that the cumulative error claim includes the
11 ineffective assistance of counsel claim, which is noncognizable.
12 (*Id.* at 7.) Respondents argue that a federal court's review of a
13 claim is limited to the record presented to the state court in
14 accordance with *Cullen v. Pinholster*, 563 U.S. 170 (2011).

15 Taukitoku has established good cause under Rule 6(a) for the
16 discovery sought. The material sought is potentially relevant at
17 the very least to Petitioner's claims of ineffective assistance of
18 counsel as it relates to counsel's failure to investigate the case.
19 The discovery material would help establish whether Taukitoku was
20 prejudiced by his counsel's alleged failure to investigate. The
21 material is also potentially relevant to Taukitoku's argument that
22 he may overcome procedural default because his state post-
23 conviction counsel was also ineffective under *Martinez v. Ryan*,
24 566 U.S. 1 (2012).

25 Respondents argue that Taukitoku's claims are precluded from
26 review because they are procedurally defaulted, and that the
27 federal court's review of a claim is limited to the record
28 presented to the state court. The holding in *Pinholster*, however,

precludes consideration of evidence received for the first time in federal court only when the court is actually conducting review of a state court decision on the merits under § 2254(d). *Pinholster* does not preclude consideration of such evidence when presented by the petitioner in an effort to overcome a procedural bar in federal court. First, presentation of evidence for that purpose does not constitute presentation of evidence on the merits of a claim adjudicated on the merits in the state courts. *See, e.g., Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (presentation of evidence to overcome a procedural default by establishing cause based on inadequate assistance of post-conviction counsel did not constitute presentation of evidence on the merits of a claim). Second, where a claim has been procedurally defaulted or otherwise is unexhausted in the state courts, the claim has not been adjudicated on the merits in a state-court proceeding in any event. *See, e.g., id.* (procedurally defaulted claim had not been adjudicated on the merits); *see also Gentry v. Sinclair*, 705 F.3d 884, 896 (9th Cir. 2013) (similar). When and if this Court reaches a merits review in this action, the Court will address to what extent *Pinholster* limits the evidence this Court considers pursuant to its review under 28 U.S.C. § 2254(d). In short, the Court will not necessarily decide every potential procedural and merits issue in the case before it permits discovery of facts that may more fully inform its consideration of at least some of those issues later in the case.

Respondents further argue that Taukitoku's discovery requests for physical materials for testing will jeopardize chain of custody and would be "catastrophic" in the event the prosecution has to

1 retry Taukitoku in state court in the future. (ECF No. 55 at 8.)
2 Taukitoku asserts that chain of custody can be maintained as he
3 has retained the services of an expert and a lab that maintains a
4 quality assurance program that includes chain of custody protocol.
5 (ECF No. 59 at 10.)

6 The Court orders that the attorneys for the Petitioner and
7 Respondents shall meet and confer and prepare for the Court a
8 proposed order permitting discovery that will assure that a proper
9 chain of custody will be maintained, and that the integrity of the
10 evidence will be maintained and that sufficient safeguards shall
11 be in place to eliminate any possibility of tampering with or
12 alteration or destruction of the evidence. The parties shall submit
13 the order to the Court on or before May 1, 2022. Should the parties
14 fail to reach an agreement, the Court will set a hearing to resolve
15 any remaining issues or conflict. The Court will not require review
16 of a proposed order and/or subpoena as to release of the copies of
17 Lattyak's bench notes and photographs used in conducting his
18 examination and preparing his ballistics report.

19 **III. Motion to Extend**

20 Taukitoku requests an extension of time to file his reply in
21 support of discovery. Good cause appearing, the Court grants
22 Taukitoku's motion to extend.

23 **IT IS THEREFORE ORDERED:**

24 1. Petitioner Samisoni Taukitoku's Motion to Extend (ECF No.
25 58) is GRANTED.

26 2. Petitioner Samisoni Taukitoku's Motion for Discovery (ECF
27 No. 51) is GRANTED.

28 3. Attorneys for Petitioner and Respondents shall meet and

1 confer and prepare for the Court a proposed order
2 permitting discovery that will assure that a proper chain
3 of custody will be maintained, and that the integrity of
4 the evidence will be maintained and that sufficient
5 safeguards shall be in place to eliminate any possibility
6 of tampering with or alteration or destruction of the
7 evidence. Petitioner shall have until May 16, 2022, to file
8 a joint proposed Court order and/or status report informing
9 the Court that the parties could not reach an agreement.

10 4. The Court's grant of discovery as to the release of 2
11 firearms, 10 projectiles, 16 casings, and 1 fragment, for
12 examination in this order is subject to the Court's
13 approval of the parties' proposed order and/or subpoena(s)
14 relative to such discovery.

15 DATED: this 30th day of March, 2022.

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20 HOWARD D. MCKIBBEN
21 UNITED STATES DISTRICT JUDGE
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